No. 10409

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THOR W. HENRICKSEN, Formerly Acting Collector of Internal Revenue for the District of Washington, and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Appellants,

v.

BAKER-BOYER NATIONAL BANK, a Corporation, Executor of the Estate of George T. Welch, Deceased,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FROM THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge.*

BRIEF FOR THE APPELLEE

BURNS POE,
ELIZABETH SHACKLEFORD,
MARVIN EVANS,
CAMERON SHERWOOD,
Attorneys for Appellee.

1004 PUGET SOUND BANK BLDG.,
TACOMA, WASHINGTON.

No. 10409

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THOR W. HENRICKSEN, Formerly Acting Collector of Internal Revenue for the District of Washington, and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Appellants,

v.

BAKER-BOYER NATIONAL BANK, a Corporation, Executor of the Estate of George T. Welch, Deceased,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FROM THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge.*

BRIEF FOR THE APPELLEE

BURNS POE,
ELIZABETH SHACKLEFORD,
MARVIN EVANS,
CAMERON SHERWOOD,
Attorneys for Appellee.

1004 PUGET SOUND BANK BLDG.,
TACOMA, WASHINGTON.

INDEX

INDEX

PAGE

CASES:

CITATIONS (Continued)

No. 10409

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THOR W. HENRICKSEN, Formerly Acting Collector of Internal Revenue for the District of Washington, and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Appellants,

v.

BAKER-BOYER NATIONAL BANK, a Corporation, Executor of the Estate of George T. Welch, Deceased,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FROM THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge.*

BRIEF FOR THE APPELLEE

OPINION BELOW

Contrary to appellants' statement, the decision below is reported as Baker-Boyer Nat. Bank v. Henricksen, et al., 46 F. Supp. 831.

The memorandum decision likewise appears in the record. (R. 61-78.)

The findings and conclusions of law also may be found in the transcript. (R. 79-91.)

JURISDICTION

The jurisdiction of the District Court was invoked under Section 24 (5th and 20th subdivisions) of the Judicial Code. (Title U. S. Code 41 subd. 5th and 20th). This is a suit to recover estate tax and interest alleged to have been erroneously assessed and collected. All of the tax and interest involved, except $1165.00, were paid to an Acting Collector of Internal Revenue, who was not in office at the commencement of the action, (R. 53).

Judgment was entered below on February 15, 1943, below allowed in favor of the appellee, on the appellee's claim for the refund of the estate tax and interest, the judgment being for $24,356.74, together with interests and costs (R. 92-93).

QUESTIONS PRESENTED

1. The fundamental question in this case is: Were the bequests to charities sufficiently definite in amount as of the date of the testator's death to be deductible in determining the net estate for estate tax purposes?

(a) The testator left the widow with approximately $225,000.00 in her own right and left her a life estate in an equal amount. The question is:

Reading the will "from the four corners" and in the light of the circumstances surrounding the testator, did the life tenant, under the provisions of the will, have power to defeat the charitable remainder by invading the corpus of the estate?

(b) Are the two identical constructions of the will made by the Probate Court, that is, the Decree of Distribution and the Order of March 29, 1940, construing the will decisions which this court should follow?

(c) Was it highly improbable at the date of the testator's death that the transfers to charity would be defeated by the life tenant?

STATUTES AND REGULATIONS INVOLVED

Sec. 303 (3) (a), Revenue Act of 1926 as amended, as set out in appellant's brief.

Treasury Regulations 80 (1937 ed.)

Art. 44. *Transfers to public, charitable, religious, etc. uses.*

> "Deductions may be taken of the value of all property transferred by Will . . . (3) to a trustee or trustees . . . if such transfers, legacies, bequests or devises are to be used by such trustee . . . exclusively for religious, charitable, . . . or educational purposes . . .
>
> "If a trust is created for both a charitable and a private purpose deduction may be taken of the value of the beneficial interest in favor of the

former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use."

Treasury Regulations 80

Art. 47. *Conditional bequests.* "If the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

FOOT NOTE. *Present Regulation on Conditional Bequests is*—Regulation 105, Sec. 81.46; Reading as follows:

If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take it so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

Section 1533, Remington's Revised Statutes of Washington.

Hearing on final report—Decree of distribution. Upon the date fixed for the hearing of such final report and petition for distribution, or either thereof, or any day to which said hearing may have been adjourned by the court, if the court be satisfied that the notice of the time and place of hearing has been given as provided herein, it may proceed to the hearing aforesaid. Any person interested may file objections to the said report and petition for distribution, or may appear at the time and place fixed for the hearing thereof and present his objections thereto. The court may take such testimony as to it appears proper or necessary to determine whether the estate is ready to be settled, and whether the transactions of the executor or administrator should be approved, and to determine who are the legatees or heirs, or persons entitled to have the property distributed to them, and the court shall, if it approves such report, and finds the estate ready to be closed, cause to be entered a decree approving such report, find and adjudge the persons entitled to the remainder of the estate, and that all debts have been paid, and by such decree shall distribute the real and personal property to those entitled to the same. The court may, upon such final hearing, partition among the persons en-

titled thereto, the estate held in common and undivided, and designate and distribute their respective shares; or assign the whole or any part of said estate to one or more of the persons entitled to share therein. That the person or persons to whom said estate is assigned shall pay or secure to the other parties interested in said estate their just proportion of the value thereof as determined by the court from the appraisement, or from any other evidence which the court may require.

If it shall appear to the court at or prior to any final hearing that the estate cannot be fairly divided, then the whole or any part of said estate may be sold or mortgaged in the manner provided by law for the sale or mortgaging of property by executors or administrators and the proceeds thereof distributed to the persons entitled thereto as provided in the final decree. Upon the production of receipts from the beneficiaries or distributees for their portions of the estate, the court shall, if satisfied with the correctness thereof, adjudge the estate closed and discharge the executor or administrator.

The court shall have authority to make partition, distribution and settlement of all estates in any manner which to the court seems right and proper, to the end that such estates may be administered and distributed to the persons entitled thereto. No estate shall be partitioned, nor sale thereof made where partition is impracticable, except upon a hearing before the court and *upon the testimony of at least three disinterested witnesses* previously appointed by the court for the purpose of viewing such property to be partitioned or sold. The court shall fix the values of the several pieces or parcels to be partitioned at the time of making such order of partition or sale; and may order the property sold and the pro-

ceeds distributed, or may order partition and distribute the several pieces or parcels, subject to such charges or burdens as shall be proper and equitable. (Italics supplied.)

Sec. 11202-I 1. Remington's Revised Statutes of Washington. *Increase in Tax Valuation to Conform to Subsequent Federal Estate Tax Valuation.*

"If after the values have been determined under the state statute for inheritance tax purposes, the same estate is valued under the federal estate tax statute and the value of the property, or any portion thereof, fixed under the federal law, is increased above the value fixed under the state statute as provided in section 5, chapter 134, Laws of 1931 (section 11202-B, Rem. Rev. Stat.) and this valuation under the federal estate tax, is accepted by the estate either by agreement or through final determination in the federal court, then in that event, the value as fixed under the state statute upon such property or portion thereof shall be increased to this amount for state inheritance tax purposes.

Applicability to pending cases, see P. 11211 e—I therein.

Sec. 1415 Remington's Revised Statutes of Washington.

INTENT OF TESTATOR CONTROLLING

"All Courts and others concerned in the execution of Last Wills shall have due regard to the direction of the Will, and the true intent and meaning of the testator, in all matters brought before them."

STATEMENT

The trial judge, in his carefully prepared decision (R. 61, et. seq.) sets forth the facts in correct detail. See also the reported opinion, Baker-Boyer Nat. Bank v. Henricksen, 46 F. Supp. 831.

The case is one involving the proper construction of the will and codicil of the late George T. Welch, a retired farmer, who died April 15, 1937, at the age of 95 years. At the time will was made his wife, Carrie Welch, was 80 years of age and in delicate health (R. 183, 212 and 218); his son, Fred Welch was 50 years of age (R. 54); and his grandson, George B. Allen was 21 years of age (R. 54).

The will and codicil (R. 9-30) were admitted to probate in the Superior Court of the State of Washington for Walla Walla County (R. 54.)

Mr. Welch's will and codicil in brief provided:

1. He gave two specific bequests of $500.00 each to old friends (R. 12).

2. He gave to his wife, Carrie Welch, in paragraph V, (R. 12) (Note 1), "for and during her life time" "all of the rest, residue and remainder" with the income therefrom without limiting her right to make

---

1. Paragraph V in full reads:

"I do hereby give, devise and bequeath unto my said wife, Carrie Welch, for and during her life time, should she survive me, all the rest, residue and re-

expenditures; with the "then remainder" over, save and except his community undivided one-half interest in a small tract of farm land upon her death to the Baker-Boyer National Bank as Trustee upon trusts hereinafter particularly described, ultimately for charitable purposes. If she died first the "then remainder" was all to go to charity, subject to the life estates of the son and grandson, except the above mentioned land, the charities to be set up by the trustee from the

---

mainder of my estate, both real and personal, including the rents, issues and profits therefrom, (10) and of whatsoever the same may consist and wheresoever situated, with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose, or any accounting be made thereof, with the then remainder over upon her death unto my Trustee, hereinafter named, in trust, nevertheless, for the uses and purposes hereinafter mentioned, and more particularly set forth, save and except by community undivided one-half interest in certain lands hereinafter described, which I hereinafter give and devise unto my son, Fred B. Welch, freed from any trust provision of my will; but should I survive my said wife, Carrie Welch, then upon my death I do hereby give, devise and bequeath all the then rest, residue and remainder of my estate, both real and personal, including the rents, issues and profits therefrom and of whatsoever the same may consist and wheresoever situated, unto my said Trustee hereinafter named, in trust nevertheless, for the uses and purposes hereinafter set forth, save and except my community undivided one-half interest in certain lands and premises which I hereinafter give and devise unto my said son, Fred B. Welch, freed from any trust provision of my will as aforesaid."

"then remainder" are further discussed in Paragraphs 5, 6 and 7.

3. "Subject to the life estate hereinbefore given . . . unto Carrie Welch" he gave to his son, Fred B. Welch, free from any trust, his community undivided interest in the above mentioned farm (R. 13, 14, 15), the testator's interest being appraised at $2500.00 (Plaintiff's original exhibit M.) If the son died before the father the farm, upon the termination of his mother's life estate, went to charity (R. 22).

4. "Subject to the life estate" of Carrie Welch, he gave to the Baker-Boyer National Bank as Trustee "the sum of Thirty Thousand ($30,000.00) Dollars in cash or the equivalent in value in securities found in my estate" as a spend-thrift trust (Note 2) for the benefit of his son, Fred B. Welch, and upon the son's death to be "used and expended for the relief and support of the poor people, maintenance of the sick or maimed . . . with special reference to such of them as may be living in . . . Washington and Oregon, and particularly in the County of Walla Walla or territory

---

2. Paragraph VII (R. 17) of the will provides:

. . . "The provision hereinbefore made for my said son, Fred B. Welch, so long as he may live, should he survive me, is upon the express condition, however, that he be and he is hereby restrained from and is and shall be without right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his beneficial and legal right, title, interest, claim and estate in and to the income of this trust during his life time . . ." (Italics supplied).

contributory thereto." If neither the wife nor son survived him, this sum was to go direct to charity (R. 10-17). The *son* was *not to have* the *ordinary powers of a life tenant.* The testator imposed limitations on these powers.

5. "Subject to the life estate" of Carrie Welch he gave to the Baker-Boyer National Bank as Trustee "the sum of Twelve Thousand Five Hundred ($12,-500.00) Dollars in cash or the equivalent in value thereof in securities found in my estate" as a spendthrift trust for his grandson, George B. Allen, and upon his death to be given to the Board of Conference Claimants, Inc., of the Methodist Church. (R. 20.)

6. Out of the residue of the estate the Trustee was directed:—

(a) To create a "Revolving Fund" out of principal or net income for the support or education of worthy boys and girls irrespective of nationality, of religious beliefs or creeds. (R. 22-23).

---

3. Paragraph VIII. (R. 20) of the will provides:—
". . . The provision hereinbefore made for my said grandson, George B. Allen, so long as he may live, should he survive me, is upon the express condition, however, that he be and he is hereby restrained from and is and shall be without right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his beneficial and legal right, title, interest, claim and estate in and to the income of this trust during his lifetime. . . . "

(b) To "Expend . . . net income" for the relief and support of indigent and aged people, irrespective of nationality or religious beliefs or creeds, with special reference to such of them as may be living in Washington and Oregon, particularly in Walla Walla County and tributary territory where his estate had been created. (R. 23-24).

(c) To "expend out of principal and/or net income" "amounts sufficient to erect or assist in the erection of a home for the aged as memorial to Carrie Welch and the testator" (R. 24-25) (Italics supplied).

(d) To use any remaining unused income for charity.

7. The directions given to the Trustee with reference to the residuary trusts include the following:

(a) The Trustee was "to hold, maintain and indefinitely retain so long as it believes it is advisable so to do . . . *the identical securities, properties or investments received by it from my estate, whether it be at my death or the death of my said wife,* Carrie Welch, should she survive me" (R. 25-26) (Italics supplied). The trustee's powers include authority "to grant, bargain, sell, exchange, convert and lease . . . pledge, assign, partition, subdivide and distribute . . . the income and principal . . . and to execute any and all instruments . . . requisite and necessary therefor . . ." (R. 26).

8. The Baker-Boyer National Bank was appointed executor "in order that . . . Carrie Welch, may be relieved of the responsibility" (R. 28) and the executor was requested to keep the wife advised of the condition of the estate.

The will is a non-intervention will with authority to the executor to lease or sell all or any part of the estate. (R. 29).

After the time for filing claims against the estate had expired (R. 106), a Final Account and Report and Petition for Distribution was filed, wherein the executor recommended to the Court, that, notwithstanding the widow and the executor had entered into a Stipulation for the partitioning of the property of the estate, Section 1533 of Remington's Revised Statutes be followed and complied with by the appointment of three disinterested persons to view the properties and give their testimony so that the Court might determine whether the proposed division was fair, just and equitable (R. 112). The Court, in the final decree, states:—

> (1) "That Martin Stearns, Bert Witt and Fred Lasater, appointed by order of this court to view the property to be partitioned and distributed herein, have viewed the same, and now testifying in open court recommend that there be partitioned and distributed to the said Baker-Boyer National Bank of Walla Walla, Washington, in its capacity as trustee herein, the real estate and personal property . . . and that there be partitioned and distributed to the said Carrie Welch the real estate and personal property de-

> scribed and referred to in said stipulation . . . her just, fair and equitable division thereof, and that the terms and provisions of said stipulation are just and equitable." (R. 142).

Carrie Welch, the widow, was represented in the distribution proceedings by other attorneys (R. 190, 224, 226) than the attorneys for the executors. They were the attorneys of another Bank (190). When the Court entered the decree of distribution (R. 160) partitioning the estate and distributing it, he did not discharge the executor or close the estate. The estate was held open for final determination and payment of the Federal Estate and the State Inheritance taxes. (164).

The federal and state government were pressing at the same time their claims for additional death taxes. There were numerous conferences in the fall of 1939 between the Technical Staff, Pacific Division, Bureau of Internal Revenue, for the purpose of reaching a settlement of the estate tax case (R. 233). The state was asking for additional inheritance tax in the sum of $34,854.11 resulting from rejection of the exemption for charitable bequests, with 8 percent interest from the date of Mr. Welch's death, and intimated there might be a further increase (R. 173) upon receipt of "the federal audit of the estate tax return."

The gross valuation of the estate was changed in the federal audit to $228,244.50 (R. 56) from $226,303.96 (R. 55). The estate tax was paid on the increased amount and also on the disallowance of the deduction for charity, with the understanding that

the payment thereof would not prejudice the right of the appellee to file a claim for refund of payments of estate tax with interest resulting from the disallowance of items of charity in computing the estate tax. Timely claims for refund were filed and rejected (R. 84, 85). Suit then was instituted, resulting in the judgment which is the basis of this appeal. (R. 2-49, 92, 93).

On March 22, 1940, the appellee, this time both as executor and as trustee, filed in the Superior Court of Walla Walla County, a petition In The Matter of the Estate of George T. Welch, deceased; its petition praying the Court to cite into court the Supervisor of the State Inheritance Tax Division and praying the Court to determine the amount of Inheritance Tax and the executor and trustee also raised the question as to the nature of the estate of the decedent's widow and as to the scope of her power to expend the corpus, reciting among other things that "until the will has been construed . . . should it pay the additional tax now demanded . . . (it) . . . would have no assurance that further tax might not thereafter be demanded" (Word in parenthesis supplied) (R. 171).

On the 29th day of March, 1940, the said Superior Court entered an Order "In The Matter of the Estate of George T. Welch, deceased," No. 26,994 of said court, the same cause in which the Decree of Distribution in the estate was entered (R. 102).

In the Order, the Court, after determining the amount of the inheritance tax, recites "and the ex-

ecutor and trustee herein having raised the question that he is entitled to instructions from the Court directing as to the fund or interest chargeable under the laws of the State of Washington and the terms of said will of the decedent and the Decree of Distribution hereto entered herein, the Court hereby orders, adjudges and decrees and construes the said will and Decree of Distribution . . .

> (2) "That under the words, terms and provisions of said will the said widow, Carrie Welch, has no power to invade the corpus of said estate . . ."

At the trial in the District Court, oral testimony was admitted for the limited purpose of showing the court the true circumstances and conditions surrounding the testator when he made his will and codicil (R. 179).

The oral testimony showed among other things that George T. Welch and his wife had accumulated a community fortune of approximately $450,000.00 in the vicinity of Walla Walla County, adjoining Oregon on the North (R. 54, 55). He had had in mind for some time setting up three or four charitable trusts and about a month before the will involved herein was drawn, had called at the Bank and made inquiry stating that he wanted to make some trusts for charitable purposes (R. 179). After the will was drafted, the managing trust officer of the bank and Mr. Welch's lawyer gathered in the Welch home to discuss with Mr. and Mrs. Welch the provisions of its different parts and their meaning. They went to the home because

Mrs. Welch was then an invalid and tied to her chair. (R. 181).

The testimony also shows that the trustee has paid over to Mrs. Welch from May 9, 1938 to December 31st, 1941, income in the amount of $28,105.00 (R. 204) and that no part of the corpus has ever been paid over to her (R. 189) and she has never asked for any part of the corpus; and that her allowance during the pendency of the probate proceedings was $300.00 a month and that she never asked for any more (R. 190).

STATEMENT OF POINTS TO BE URGED

1. Construing the instrument as a whole, the will bequeathed to the widow a life estate without power to diminish the corpus.

2. Had the widow power to invade the corpus, such would be so highly improbable (in view of the surrounding circumstances) as not to render the bequest to charity uncertain.

3. The will has been twice construed by the Superior Court of the State, having jurisdiction of the estate, and the construction was in accordance with the laws of the state and should be adopted.

SUMMARY OF ARGUMENT

I.

The general rules of construction which are particularly applicable to the construction of the Welch will are:

A. The intention of the testator is to be determined from an examination of the entire instrument.

B. The Welch will is to be distinguished from wills wherein express power of invasion of the corpus is given. In the Welch will there is an express estate for life to the widow, express estates in remainder, but no express power to the widow to invade the corpus.

(1) The Washington cases cited by the appellants are not in point because they construe wills where express power of invasion was plainly given, or where the question of invasion was not an issue in the case.

C. Charitable bequests are favorites of the law. If there are two meanings to a word—one of which will effectuate and the other will defeat the charitable object, the former should be selected.

II.

Discussing, in the light of the whole will and the surrounding circumstances, the particular words from which the appellants imply the power to invade:

A. "No limitation in any expenditures for any purpose."

(I) The power of disposition must be expressly given and does not arise by implication generally, and words are strictly construed to protect the remainderman.

(II) The words do not confer any power to invade the corpus, either express or implied.

B. "Or any accounting be made."

(1) This provision means no more than that an accounting could not be required as

long as the widow managed her life estate in good faith.

C. "The then remainder."

(I) The other portions of the will indicate that the "then remainder" means the residue after carving out certain sums and adding unused income.

III.

Invasion is highly improbable in view of the circumstances of the widow.

IV.

The construction of the will by the Superior Court of the State of Washington is correct and should be adopted.

ARGUMENT

This controversy arises over the erroneous construction placed by the appellant on an isolated portion of the will of George T. Welch without giving the proper consideration to the intent of the testator.

The appellee filed an original estate tax return with the collector of internal revenue and paid $146.50 estate tax to him on the basis that the widow, a life tenant, had no powers to invade the corpus, and the total amounts set aside in the will for charitable purposes, to-wit: $12,500.00 for Board of Conference Claimants, Inc., of the Methodist Church and $159,035.74 residue (including a $30,000 bequest) was fixed and ascertainable at the time of the decedent's death and therefore deductible item.

After much discussion with the Bureau of Internal Revenue the appellee paid an additional estate tax and interest with the understanding that a claim for refund would be filed for the entire amount. The district court agreed with the appellee that the widow had no right of invasion and said items were deductible and gave a judgment for the appellee for the amounts so paid. The will set up complete machinery for the handling of the residuary amounts, for the benefit of old people principally, and showed that the testator had carefully planned for the use of his money for charitable purposes, and had contemplated that someone else, evidently his wife, would later join in building, in memory of both of them, a home for old folks.

CONSTRUCTION OF WILLS "BY THE FOUR CORNERS"

Appellant's brief is largely taken up with consideration of less than one sentence of paragraph V of the will. It reiterates and repeats the language of a segment of Paragraph V throughout the brief seeking a strained and unrealistic construction and ignoring the patent fact that the most important provisions of the will precedes and follows this isolated portion. This ignores rules laid down by the courts for construction of wills. The Washington State Supreme Court has so held:

> "The will should be construed so as to give effect to the intention of the testator, and in ascertaining the meaning of the particular words, phrases, clauses or paragraphs, the intention of the tes-

tator, is to be determined from an examination of the entire instrument."

Bank of California v. Turner, 193 Wash. 270, 273.

See also:

Colton v. Bank of California, 145 Wash. 503, 506;

Cowles v. Matthews, 197 Wash. 652.

In the Welch Will the widow takes an estate "for and during her lifetime" (R. 12) being a life estate, and expressly and repeatedly referred to elsewhere as such (Paragraphs VI, VII, VIII, and IX of Will) and there is nowhere to be found an *express* power on the part of the life tenant to invade the corpus.

The appellants make the bold assertion that the decision of the state court is contrary to the law of the State of Washington as determined by its highest court (Appellant's brief 9). In the cases cited by the appellants to support their assertion, the will or other instrument construed gave the life tenant the power to alienate the corpus of the estate or deplete or even exhaust the remainder either by express words to that effect or by implication so plain it is not subject to question. (4.)

---

(4) Cases cited by appellant are:

In re Gochnour's Estate, 192 Wash. 92. The will read: "to my husband . . . with full power to *alienate* the same for his own use and benefit during his natural life and I direct that at the death of my said husband, Jacob B. Gochnour, all of my said property . . . then remaining go

Furthermore, the appellants pick out the few words in the Will that will best suit their purpose, and then forget the rest of the instrument. The effect of such interpretation is to drain off as taxes a substantial portion of the assets intended by the testator for the charities. This is contrary to the intent of Congress and to the well established rule that charitable bequests are the favorites of the law.

Young Men's Christian Assn. v. Davis, 264 U. S. 47; 68 L. ed. 558; 4 A. F. T. R. 3806.

St. Louis Union Trust Co. v. Burnet (8th C. C. A.) 59 Fed. (2) 922; 11 A. F. T. R. 626, where it is said:

. . . to my nieces and sister." (Italics supplied.

In re Bolstad's Estate, 200 Wash. 31. The opinion says: "under the terms of the trust agreement, the trustee may *use* the *principal* and *income* for the care and maintenance of the cestui que trust." (Italics supplied.)

In re Ivy's Estate, 4 Wash. (2) 1. The opinion says: "Under . . . the trust agreement the trustor, or the survivor, may, with the approval of the trustee, *amend* or *revoke the trust agreement.*"

Porter v. Wheeler, 131 Wash. 482. The will read: "I gave . . . to my wife all the balance of my property . . . to be used and enjoyed by her during her lifetime; and at her death, I will that all of said property not used for her support and comfort go to my son . . ."

The question as to the widow's power to invade was not in the case. Evidently the parties conceded that she had such power; the issue was whether the powers of life tenant were not so broad as to give absolute ownership.

> "If there are two meanings to a word, one of which will effectuate and the other defeat the testator's object, the Court will select the former."

The Washington State Supreme Court has adopted the rule that charities are favored:

> De LaPole v. Lindley, 118 Wash. 398.

LIFE ESTATE AND "EXPENDITURES"

When, in paragraph V, Mr. Welch gave property to his wife "for and during her lifetime" he gave a life estate, and by that name he repeatedly refers to it thereafter in the will. (See R. 13, 15, 19, and 22, where appears the expression "subject to the life estate hereinbefore given" to Carrie Welch.) (Uses "life estate" at R. 20.)

The ordinary life tenant has the implied power to expend income and under certain circumstances has the duty to do so. Expenditures for general taxes, repairs, and upkeep on the properties, are expenses fairly incidental to the maintenance of the realty used by the life tenant and are payable by him. (In re Albertson, 113 N. Y. 434, 21 N. E. 117, quoted in Stahl v. Schwartz, 81 Wash. 295.)

If the life tenant is to have power to do more than that, such power must be clearly given.

> "The power of disposition in a tenant for life under a will must be expressly given as it does not generally arise from implication . . . It is usually construed strictly" . . . "and will be

confined to the protection of the remainderman to the purpose for which it was given."

Thompson on Real Property, 1924 Ed. Vol. 3, Sec. 2214.

Burnet v. Burnet (Mo.) 148 S. W. 872, where it is said:

> "The principle to be extracted from these cases is that where a life estate is created whether by implication or by express words, with a remainder over, the power of the life tenant to defeat the remainder depends upon . . . the superadded power of disposition expressly or impliedly from the will, that such additional power will be strictly construed, and confined to its exact intendment, and any attempted exercise thereof beyond its just scope will not affect the rights of the remaindermen."

The isolated expression "that no limitation is placed on my said wife in any expenditures" is not a grant of power, at all. It does not give power to do anything. Words in paragraph V, "with the distinct understanding that no limitation is placed on my said wife in any expenditures she may make for any purpose" (R. 12), are added for emphasis only. The court might say of this language in Mr. Welch's will what was said of certain expressions in the will of another successful Washington business man:

> "The testator here, although presumed to know the law, seems to have taken special pains to make his intentions clear . . . by adding . . . words . . ."
>
> (Davis v. Brown, 112 Wash. 129.)

See also:

Wyant v. Lynch, 140 S. E. 478 at 488.

The trustee, under the will was given express powers to invade, sell or otherwise dispose of the property constituting the corpus of the estate. (See paragraph IX of the will. R. pp. 22-27).

The will expresses this power granted to the trustee, and significantly, not granted to the life tenant, in the following words:

> "My trustee is hereby directed to take out of my trust estate . . . either out of the principal and/or out of the net income . . . (paragraph IX (a) of will).
>
> "My said trustee . . . is hereby authorized . . . to expend out of the principal and/or out of the net income . . . (paragraph IX (c) of will.)
>
> "To grant, bargain, sell, exchange and lease and . . . to pledge, assign . . . partition, sub-divide and distribute . . . the income and principal of my said trust estate." (Paragraph IX (b) (2) of will).

If the testator wanted the widow to have the same powers as the trustee why did he not say so? The difference in the words used is a distinguishing mark by which he sets the trustee and the life tenant each in its place in his scheme for the disposition of his estate.

What the testator apparently meant by the words "no limitation . . . on expenditures . . . without accounting be made thereof" was that if the widow

wanted to use any sum of money out of the income from his estate in managing her affairs she should not be required to seek the approval of someone else before acting. Unsolicited advice would be meddling. The implication is that he wanted her to have the same independence that he had in seeking advice. (R. 182.)

Should she not use or expend all the income from his estate, then, under the provisions of decedent's will, the *then remaining* unused income would vest in the trustee for charitable purposes. Mr. Welch gave his widow only so much of the income as she would expend and no more, and there can be no doubt about this when we consider the language of the will as a whole. (See R. pp. 10, 13, 16, 17, 19, 25 for references to "unused income" by testator; particularly paragraph IX (d) of Will, R. 25).

The word "expenditures" as used in paragraph V of the will, by common understanding generally contemplates "paying out."

> Suppinger v. Enking (Ida.), 91 P. (2d) 362, Syllabus (1);
>
> In re: Holmes' Estate, 289 N. W. 638, 641, Syllabus (7).

Expend—Expenditure. "A man cannot spend which he has not got. He can mortgage or pledge but he cannot actually spend. per Kekewich J." Strouds Judicial Dictionary.

Expenditure—The act of expending, disbursements, money expended, laying out of money; payment. 25 C. J. 172.

The word expenditure is used in Poole v. Kane, 61 N. Y. S. 199 in sense of payment.

To Expend implies receiving something in return —In re: Holmes Est., 289 N. W. 638.

Expenditure means expend, to pay out, use up, consume—Black's Law Dictionary.

Expend is not a gift—Davison v. Safe Deposit & Trust Co., 63 Atl. 1045.

The Commissioner of Internal Revenue uses it in the common sense, in Article 31 of Estate Tax Regulations No. 80, which provides:

> "a reasonable expenditure by the executor for a tombstone . . . monument, mausoleum or for a burial lot . . . may be deducted."

The testator himself uses the word in that sense elsewhere in the Will. For instance, he authorizes the trustee "to expend . . . sufficient to erect or assist in the erection of a building" (R. 24) and "to expend so much of the net income." (R. 13).

The testator apparently had in mind that his widow should not be restricted in managing her affairs and, therefore, placed no limitations on payment of expenses incurred. There is a difference between the right to make "expenditures" and the position of appellants that the widow was granted the right to alienate the corpus.

We cannot improve upon the explanation the trial court gives:

> "It is evident that the testator wished to free his invalid wife during her short expectancy, in the event she should survive her husband at all, from being under the fear that she would be interfered with as to such expenditures as she might make of the income and from the fear that she would be required to make any accounting of such expenditures of the income. In the closing paragraph of his will the testator used these words: 'In order that my said wife, Carrie Welch, may be relieved of the responsibility in the administration upon my estate and the responsibility incident thereto, I do hereby nominate and appoint my said trustee . . . the executor of this my last will and testament . . .' "

Baker-Boyer National Bank v. Henricksen, 46 F. Supp. 831, at 836.

As further indication that the testator did not intend his widow to disturb the corpus, we call attention to the language in the Will wherein the testator directed that the trustee was:

> "To hold, maintain, and indefinitely retain so much as it believes it is advisable so to do, in which it shall be the sole judge thereof, the identical securities, properties or investments received by it from my estate, whether it be at my death or at the death of my said wife, Carrie Welch." (Par. IX (a) of Will R. 25).

Likewise, the testator intended that the two trust funds should include:

> "Cash or the equivalent in value in securities found in my estate (R. 16, 19)"

so apparently he did not intend the widow to invade them.

In this connection, while we deem it unnecessary in this case to supply any words in the interest of clarity in the construction of the Will, we wish to state the Courts do have the power to supply words in a Will whenever necessary to effectuate the testator's intention as expressed in the Will.

In re:

Peters' Estate, 101 Wash. 572.

The words "of income" might very properly be supplied in the will under consideration immediately following the term "expenditures" in paragraph V thereof. But this is unnecessary, we submit, in order to reach the same result from the language of this will.

Smith v. Bell, 6 Peters 68; 8 L. Ed. 322;
Russell v. Werntz, 44 Atl. 221.

LIFE ESTATE AND "OR ANY ACCOUNTING"

In Boden v. Johnson, 47 S. W. (2d) 155, the will provided that a mother would not be required to account for expenditures for the benefit of the children of the decedent. She diverted some of the income of the estate, and in an action challenging her right to do so, the court held that while she did not have to account for the *expenditures* she was required to use the income for the children's benefit.

In Tilton v. Tilton, 47 Alt. 256-257, the court says:

"If she should attempt to divert the property from them by fraudulent or unauthorized man-

agement or appropriation they would have a remedy in equity. So long as she manages and uses it according to her rights the plaintiffs have no cause to complain or to call her to account."

LIFE ESTATE AND "THEN REMAINDER"

In Paragraph V of the will, the testator directed that in event Mrs. Welch survived him the *"then remainder"* (R. 12) . . . "save and except my community undivided one-half interest in certain lands . . . which I hereinafter give . . . unto my son" shall be given over unto the trustee; and the testator next provided in the same Paragraph V (R. 13) that, should he survive her, then *"then* rest, residue and *remainder* of my estate," save and except the same farm, shall be given over unto the trustee. (R. 13) (Italics supplied). The appellants (P. 16) in their brief say that the phrase "then remainder" connotes the possibility of the corpus having undergone a quantitative change during the tenure of the life estate. Then, what does "then . . . remainder" mean, if Mr. Welch died first, and there was no preceding life estate? Appellee attaches the same meaning to this phrase in both instances, that is: The "then remainder" in each instance mean the estate plus any additions of unused income, and less bequests carved out of the estate. Like the expression "all the remaining property constituting my estate at her death" in Mead v. Welch, 95 F. (2) 619, the "then remainder" means, in each instance, "the estate remaining after the sum specified . . . had been carved out rather than to have reference to so much of the estate as may be left uncon-

sumed by the first taker." There were "sums specified to be carved out" in the Welch estate, that is, the two $500 bequests (P. IV, R. 12) and any remaining unused income was to be added thereto (R. 25, d; R. 10).

INVASION HIGHLY IMPROBABLE

The appellants take the position that it is not possible to say, as of the testator's death, that it is improbable that the life beneficiary would invade the corpus (Brief, 34).

We do not concede that the widow had any power or authority under the will to invade the corpus, at any time. But assuming solely for the purpose of considering the appellant's argument, that the widow had such power, our position is that the probability of her exercising it was remote, in view of her independent means, advanced age, frugal habits, modest home and of her income from the life estate; and in view of the further fact that she could not pass a marketable title.

The circumstances as to the widow's means, age and her habits of living have all been taken into consideration in other cases in considering the probability of invasion.

Ithaca Trust Co. v. U. S., 49 S. Ct. 291; 73 L. ed. 647;

Mead v. Welch, 95 F. (2) 617; (9th Circuit) (Opinion by Judge Healy).

As this court said in Commissioner of Internal Revenue v. Bank of America National Trust & Savings Association, decided Feb. 25, 1943; 133 Fed. (2d) 753:

> "Naturally, cases arising under this statute present gradations of probability; and we do not wish to be understood as suggesting that charitable bequests in remainder are deductible where there is real likelihood of an undetermined part of the corpus being taken for the benefit of the life tenant. It is the duty of the Commissioner, in administering this statute, to give effect to the beneficent purpose of Congress, and we believe a proper performance of the duty requires that attention be paid to the actualities of each case, The administrative difficulties in the way of doing that are not insurmountable. On the other hand, a blind adherence to arbitrary standards must result in many instances in the needless frustration of the legislative policy.
>
> "The judgment of the Board is affirmed." (opinion by Judge Healy).

See also:

U. S. v. Provident Trust Co., 54 S. Ct. 389, 78 L. ed. 793;

Comm. v. Bonfils Trust, 115 F. (2) 788.

As to the possibility of her giving marketable title, we cite:

Brandt v. Virginia Coal Co., 3 Otto 326; 23 L. ed. 927;

West v. American Tel. and Tel. Co., 311 U. S. 223; 85 L. Ed. 139, 132 A. L. R. 956;

Graves v. Bean (Ark.), 141 S. W. (2) 50.

EFFECT OF CONSTRUCTION BY PROBATE COURT

The will has been construed by the Probate Court on two occasions, and by the interested parties; and the Inheritance Tax Division of the State of Washington accepted the construction of the will by the Superior Court without appeal. The construction by the probate court is entitled to great weight.

> "By that instrument (constitution) probate courts were superseded and jurisdiction 'given in all matters of probate' was vested in the superior courts. In dealing in matters of probate, therefore the superior court does not require aid of any other court or the aid of any form of procedure to fully adjudicate the matters before it. In such instance it exercises all of its powers as a court of general and superior jurisdiction, and when the justice of the matter requires it do so, it may enter in the proceeding itself such orders and judgments as the necessity of the matter requires."

In re:

Gardella, 152 Wn. 250-256. (Word in parenthesis supplied)

One of the occasions the Court construed the will was when the Decree of Distribution was entered.

A Decree of Distribution is a final adjudication of the rights of the parties interested in the probate proceedings.

Golden v. McGill, 3 Wash. (2) 708;
Farley v. Davis, 10 Wash. (2) 62.

Where testimony was taken and judicial discretion exercised there was no waiver of rights, and such a decree is not a consent decree.

Harter v. King County, 11 Wash. (2) 583.

There has been no showing of collusion between the parties in connection with the entry of either of the probate orders.

Final decision of state courts of general jurisdiction under similar circumstances have been held to be conclusive.

Comm. v. Blair, 57 S. Ct. 330; 81 L. Ed. 465;
Helvering v. Rhodes Est. (8 C. C. A.) 117 Fed. (2) 508;
Uterhart v. U. S., 240 U. S. 598; 36 S. Ct. 417; 60 L. Ed. 819;
Freuler v. Helvering, 291 U. S. 35; 54 S. Ct. 308; 78 L. Ed. 634;
Sharpe v. Commissioner, 107 Fed. (2) 13;
Hoxie v. Page, 23 Fed. Supp. 905;
West v. Am. Tel. & Tel. Co., 311 U. S. 223, 85 L. Ed. 139.

As a court of general jurisdiction the Superior Court for Walla Walla County was endowed with all the power necessary to determine property rights of the interested parties, construe the will, instruct the trustee (See: Comm. v. Blair, supra) and if necessary to make a final determination of the inheritance tax, and when it exercised that power, the persons affected thereby are bound by the court's decrees. If

such decrees are in accordance with the laws of Washington, the federal government should follow them in those cases where the state law applies, and if they decided property rights, the federal government should be bound by them. Judge Paul, who heard these matters in the Supreme Court had long been on the superior court bench (Appointed June 23, 1934, 178 Wash. —List of Judges of the Superior Court). Judge Black had also been a probate judge (189 Wash. name appears in List of Judges). Three years had elapsed since the death of George T. Welch and the estate was confronted with 24 percent cumulative interest on an overhanging proposed inheritance tax of approximately $35,000. The audit of the internal revenue agents had been accepted by the executors, the additional estate tax had been paid, and yet the State had not closed its inheritance tax. The only recourse for the executor was to ask for a final adjudication and final determination of all questions involved. The hearing was regular, indicating testimony was taken, argument of counsel heard, and over a year has elapsed and no appeal has been taken by the State, which was brought in by a citation, as prayed for in the petition. There was no provision of law to require the presence of the United States revenue officials on such matters in state courts.

CONCLUSION

The decision of the trial court is presumptively correct, and the findings of the trial court will not be set aside unless they are clearly wrong.

The Quarrington Court, 122 Fed. (2) 266 at 267.

We submit that the judgment below should be affirmed, for the reasons stated herein.

Respectfully submitted,

BURNS POE,
ELIZABETH SHACKLEFORD,
MARVIN EVANS,
CAMERON SHERWOOD,
Attorneys for Appellee.
1004 PUGET SOUND BANK BLDG.,
TACOMA, WASHINGTON.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

THOR W. HENRICKSEN, formerly Acting Collector of Internal Revenue for the District of Washington, and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington, *Appellants,* vs. BAKER-BOYER NATIONAL BANK, a corporation, Executor of the Estate of George T. Welch, deceased, *Appellee.*	No. 10,409 Jan. 5, 1944

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division

---

Before GARRECHT, DENMAN and HEALY, Circuit Judges.

GARRECHT, Circuit Judge.

There will be stated herein only such of the facts as relate to the question of whether or not the decree of distribution and the order construing it, both made by the Superior Court of Walla Walla County, Washington, are binding upon the appellants herein.

George T. Welch died on April 15, 1937, leaving an estate of $226,303. This amount represented one-half of the community estate, of which the other half under the laws of Washington belonged to the widow.

After providing for three cash bequests, Mr. Welch's will contained the following disposition:

> "I do hereby give, devise and bequeath unto my said wife, Carrie Welch, for and during her lifetime, should she survive me, all the rest, residue and remainder of my estate, both

> real and personal, including the rents, issues and profits therefrom, and of whatsoever the same may consist and wheresoever situated, with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose, or any accounting be made thereof, with the then remainder over upon her death unto my Trustee, hereinafter named, in trust, nevertheless, for the uses and purposes hereinafter mentioned, * * *''.

Subject to the life estate thus created, Mr. Welch gave to his trustee, the appellee herein, $30,000, the income from which, if any, was to be paid, under the terms of the will, to the decedent's son, Fred B. Welch. Mr. Welch also devised to his son, subject to the widow's life estate, the testator's undivided one-half community interest in certain realty, as his son's absolute estate. A number of other bequests in trust were made, including one of $12,500 for admittedly charitable use by the Board of Conference Claimants, Inc., of the Pacific Northwest Annual Conference of the Methodist Episcopal Church.

All the remainder of the estate, subject to the widow's and other interests outlined above, was devised to the appellee in trust for the concededly charitable purposes of providing support or education for boys and girls, providing support for the poor, aged and infirm, and erecting a home for the aged as a memorial to the testator and his widow.

On April 7, 1938, the widow entered into a stipulation for the partition of the estate, the effect of which admittedly was to permit the widow to receive only the income from her husband's property. This stipulation was approved by Judge Timothy A. Paul of the Superior Court of Walla Walla County, Washington. The stipulation was made a part of the appellee's Final Account and Report and Petition for Distribution, which was in turn "in all respects allowed, approved and settled" by the Superior Court.

On May 9, 1938, the same Court entered its final decree in the Matter of the Estate of George T. Welch, Deceased, adjudging, among other things, that the partition just referred to was a "just, fair and equitable division" of the estate described therein.

On March 29, 1940, the same Superior Court, in an action entitled "In the Matter of the Estate of George T. Welch, Deceased, Baker-Boyer National Bank, a corporation, as Executor and Trustee, Petitioner, vs. State of Washington, Inheritance Tax and Escheat Division, Respondent," made an order holding that the State of Washington was "not entitled to assess inheritance taxes against the estate due to the fact that the charitable trusts created by the will of the decedent . . . were not limited to use in the State of Washington," and decreeing that the State was entitled to an additional inheritance tax of $3.16.

The above order contained the following language pertinent to the instant case:

> ". . . the executor and trustee herein having raised the question that he is entitled to instructions from the court directing as to the fund or interest chargeable under the laws of the State of Washington and the terms of said will of the decedent and the decree of distribution heretofore entered herein, the court hereby orders, adjudges and decrees and *construes the said will and decree of distribution:*
>
> "(1) That under the words, terms and provisions of the said will, *admitted to probate herein and made a part hereof by reference,* the widow of the decedent, Carrie Welch, is entitled to receive from the decedent's half of the community property distributed to the trustee by the decree of distribution on file herein; that under the words, terms and provisions of said will, the said widow Carrie Welch, received only a life estate with a vested remainder over to the remaindermen therein mentioned, and subject to the trusts therein created.
>
> "(2) That under the words, terms and provisions of said will the said widow Carrie Welch has no power to invade the corpus of said estate, but, during her lifetime, is entitled only to the net income above mentioned.
>
> * * *
>
> "(4) That the trustee shall not permit the corpus of the said estate to be invaded by the said Carrie Welch, but shall at all times manage and control said property in accordance with the terms of said trust with the powers therein given to it . . ." [Emphasis added]

No appeal was taken from the foregoing order of the Superior Court.

The appellee herein, as executor of the estate, filed an estate tax return with the appellant Henricksen, on a gross valuation of $226,303.96, and a net valuation of $7,325.42. The estate tax shown on the return and paid by the appellee was $146.50. The executor took as deductions in the return bequests for religious, charitable, scientific and educational purposes.

The Commissioner of Internal Revenue raised the gross valuation of the estate to $228,244.50, and increased the net estate to $180,301.68 by the disallowance of the above described charitable bequests, thereby increasing the estate tax by $21,417.55 over the tax of $146.50 already paid. This additional amount was paid to the Collector with interest on November 1, 1939, and January 9, 1940. On March 24, 1941, the appellee paid an additional assessment and interest, in the total amount of $1,165. Timely claims for refund were made, but were rejected by the Commissioner. On August 19, 1941, the appellee filed an action in the court below for recovery of the taxes paid, plus interest. The lower court entered a judgment for nearly the total amount claimed. From that judgment the present appeal has been taken.

Section 303 of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by c. 209, 47 Stat. 169, § 807, and by c. 277, 48 Stat. 680, §§ 403(a) and 406, reads in part as follows:

> "Section 303. For the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a citizen or resident of the United States, by deducting from the value of the gross estate—
>
> * * *
>
> (3) The amount of all bequests, legacies, devises, or transfers, * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes * * *."

Article 47, Treasury Regulations 80, contains in part the following language:

> "Art. 47. *Conditional bequests.*—
>
> * * *

> If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

The ultimate questions in this case as formulated in the language of appellant are:

(a) Did the will give the widow the right to invade the corpus of the estate?

(b) If so, were the bequests to charities sufficiently definite and ascertainable as of the date of the testator's death to be deductible in determining the net estate for estate tax purposes under Section 303(a)(3), supra?

As we have seen, the Superior Court of Walla Walla County held that the will did not give the widow the right to invade the corpus, and that the trustee under the will—the appellee herein—should not permit her to do so. If that order is binding upon the appellants and upon this Court, it is determinative of the instant case.

The appellants concede that the will should be interpreted in the light of state law, but deny that the order of the Superior Court of Walla Walla County is conclusive here. In Uterhart v. United States, 240 U.S. 598, 603, also a will case, the Government went farther in its admission. In that case the Court said:

> "It is very properly admitted by the Government that the New York decree is in this proceeding binding with respect to the meaning and effect of the will. The right to succeed to the property of the decedent depends upon and is regulated by state law (Knowlton v. Moore, 178 U.S. 41, 57), and it is obvious that a judicial construction of the will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees."

In Knowlton v. Moore, 178 U.S. 41, 58, supra, which was followed in the Uterhart case, supra, quoted from in the preceding paragraph, Mr. Justice [later Chief Justice] White used the following emphatic and unequivocal language:

> ". . . the right to regulate successions [estates] is vested in the States and not in Congress."

In Freuler v. Helvering, 291 U.S. 35, 44-45, the court said:

> "We understand the respondent to concede the binding force of a state statute, or a settled rule of property, followed by state courts, and, as well, an antecedent order of the court having jurisdiction of the trust, pursuant to which payments were made. But, if the order of the state court does in fact govern the distribution, it is difficult to see why, whether it antedated actual payment or was subsequent to that event, it should not be effective to fix the amount of the taxable income of the beneficiaries. We think the order of the state court was the order governing the distribution within the meaning of the Act.
>
> "Moreover, the decision of that court, until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is none the less a declaration of the law of the State because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them."

The right of a trustee to request instructions from the court in a case of this kind, and the line of demarcation between the powers of a State court and a Federal court in tax matters involving the construction of wills, are succinctly discussed by Mr. Chief Justice Hughes in Blair v. Commissioner, 300 U.S. 5, 9-11:

> "*Second.* The question of the validity of the assignments is a question of local law. The donor was a resident of Illinois and his disposition of the property in that State was subject to its law. By that law the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest in whole or in part, are to be determined. The decision of the state court upon these questions is final. [Cases cited] It matters

not that the decision was by an intermediate appellate court. Compare Graham v. White-Phillips Co., 296 U.S. 27. In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit between the trustees and the beneficiary and his assignees, and the decree which was entered in pursuance of the decision determined as between the parties the validity of the particular assignments. Nor is there any basis for a charge that the suit was collusive and the decree inoperative. [Case cited.] The trustees were entitled to seek the instructions of the court having supervision of the trust. That court entertained the suit and the appellate court, with the first decision of the Circuit Court of Appeals before it, reviewed the decisions of the Supreme Court of the State and reached a deliberate conclusion. To derogate from the authority of that conclusion and of the decree it commanded, so far as the question is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction.

"In the face of this ruling of the state court it is not open to the Government to argue that the trust 'was, under the Illinois law, a spendthrift trust.' The point of the argument is that, the trust being of that character, the state law barred the voluntary alienation by the beneficiary of his interest. The state court held precisely the contrary. The ruling also determined the validity of the assignment by the beneficiary of parts of his interest. That question was necessarily presented and expressly decided.

"*Third.* The question remains whether, treating the assignments as valid, the assignor was still taxable upon the income under the federal income tax act. That is a federal question."

See also Sharp et al. v. Commissioner of Internal Revenue, 303 U.S. 624, 625; Lyeth v. Hoey, 305 U.S. 188, 193; Hubbell v. Helvering, 8 Cir., 70 F.2d 668, 669; Commissioner of Internal Revenue v. Dean, 10 Cir., 102 F.2d 699, 701; Sharpe v. Commissioner of Internal Revenue, 3 Cir., 107 F.2d 13, 14, certiorari denied, 309 U.S. 665, 666; Helvering v. Rhodes' Estate, 8 Cir., 117 F.2d 509, 510; Plunkett v. Commissioner of Internal Revenue,

1 Cir., 118 F.2d 644, 648; Hidden v. Durey, [DC NY] 34 F. 2d 174, 178.

So in the instant case, the question of whether or not Mrs. Welch could invade the corpus of the trust estate was one for the courts of the State of Washington to decide. On the other hand, whether or not the charity bequests in the will are taxable in the event that it is determined that Mrs. Welch could not invade the corpus, is a matter for the Federal courts to adjudicate. The appellants concede, however, that "the nature of the widow's estate under the will" is a "question precedent to that of whether the amounts of the bequests to charity were ascertainable at the date of the testator's death and, accordingly, [whether] the amounts [were] deductible from the gross estate for estate tax purposes." In other words, if it is found that under the will, as interpreted by the state court, Mrs. Welch could not invade the corpus of the estate, a Federal court, interpreting the Federal tax statute, must rule that the appellee shall prevail.

The appellants complain that the order of the Superior Court of Walla Walla County "insofar as it is relevant here, was a non-adversary proceeding" and that "neither the widow nor the remainder interests [were] a party to the proceeding."

It has long been settled that a probate proceeding is one in rem, and that if the statutory provisions regarding constructive service and notice are observed, it is binding upon "all persons in the world". Seventy years ago the Supreme Court definitely endorsed the principle. In the case of Broderick's Will, 88 U.S. 503, 509, 519, the Court said:

> ". . . the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem,* in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of the court having jurisdiction. The public interest requires that the estate of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with the last chance

of injustice and fraud; and that the result attained should be firm and perpetual.

* * *

"The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem.*" *

That constructive service is sufficient in proceedings that are in rem is hornbook law, established many decades ago by Pennoyer v. Neff, 95 U.S. 714, 727. In his monumental opinion, Mr. Justice Field said:

"Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, *or to partition it among different owners,* or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem." [Emphasis added]

The final decree of distribution in the instant case recites that "due and legal notice of the hearing upon said Final Account and Report and Petition for Distribution has heretofore been given by posting and by publication and as by law required and in full compliance with the Order of this Court," etc. As we have seen, that decree of distribution approved the stipulated partition between the community estate of Mr. Welch and that of his widow. Indeed, it is not questioned that all the required

statutory formalities were complied with in the probate proceedings that were had in the Superior Court of Walla Walla County.

The Supreme Court of the State of Washington has been emphatic in its pronouncements as to the sweeping and conclusive effect of orders and decrees of distribution.

In the case of In Re Daub's Estate, 190 Wash. 420, 427, the Court said:

> "This brings us to a consideration of the binding force of the decree of distribution. The decree was entered in a proceeding *in rem* and, proper notice having been given, was binding upon the entire world in respect of every question properly before the court for determination. [Case cited.] No personal notice was given to the remainderman of the hearing on the final account; but, the published notice having been given, no personal notice was required."

Again, in Farley v. Davis, 10 Wash.2d 62, 70-71, 76-77, the following language was used:

> "It is settled law in this state that orders and decrees of distribution made by superior courts in probate proceedings upon due notice as provided by statute are final adjudications having the effect of judgments *in rem*, and are conclusive and binding upon all persons having any interest in the estate and upon all the world as well. [Many cases cited.]
>
> "Such decrees cannot be attacked or annulled in any collateral proceeding, except for fraud. [Cases cited.]
>
> * * *
>
> "Appellant's next contention is that the property was sold without the actual knowledge of appellant or of any of the heirs. There is no statute in this state which requires that personal notice of sales of real property in probate proceedings be given to persons who are interested in the estate. The administration of an estate is a proceeding *in rem*, and when real property belonging to the estate is ordered to be sold, the statute requires only that notice of sale be given by posting and publication, whether the sale be by public auction . . ., or at private sale . . . Likewise, notice by posting and publication, only, is required with respect to the

hearing of the final report and petition for distribution. [Authorities cited.]''

See also In Re Ostlund's Estate, 57 Wash. 359, 364-366; Doble v. State, 95 Wash. 62, 69; In Re Nilson's Estate, 109 Wash. 127, 128.

Nor is this view of the Supreme Court of Washington regarding the binding effect of a probate order or decree confined to one in distribution only. In Krohn v. Hirsch, 81 Wash. 222, 227, the Court, after reviewing a number of its earlier decisions, said:

> ''These decisions also render it plain that this court holds that the statutory manner of giving notice preliminary to the rendering of orders and decrees in probate, although such notice is only constructive, that is, by publication and posting, amounts to due process of law, so that orders and decrees rendered in pursuance thereof are as binding upon all interested parties, so far as the subject-matter before the court is concerned, as if such parties were brought into court by personal notice. So thoroughly has this become the settled law of this state that further review and citation of authorities seems at this time unnecessary.''

Accordingly, since both the stipulated partition, approved by the decree of distribution, and the order made by the Superior Court of Walla Walla County, settled the extent of Mrs. Carrie Welch's interest in the corpus of the estate, and adjudicated that she did not have the power to invade it, we find that the charity bequests were sufficiently ascertainable to warrant their deduction from the gross estate for estate tax purposes.

The judgment of the court below is consequently affirmed.

(Endorsed:) Opinion. Filed Jan. 5, 1944. Paul P. O'Brien, Clerk.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO. 1/6/44—110.